(Kumara Pillai,J and Joseph,J).

A.S. No. 4 of 1951.

J u d g m e n t.

(Delivered by Joseph,J.)

This appeal arises from the preliminary decree in a suit for partition of the estate of one Anthony who died on 5-1-1949. By his first marriage he had two sons, the 1st plaintiff and one Joseph and two daughters, Kunjeleechi who pre-deceased him and the 9th defendant. After the death of his first wife he married the 1st defendant and Defendants 2 and 3 are the sons and Defendants 4 to 7 the daughters by the second marriage. The 8th defendant is the son of Kunjeleechi deceased and the 10th defendant is the 1st plaintiff's wife. These parties were impleaded as they were legatees under the Will of Anthony. According to the last Will and testament of the deceased the assets were to be divided among the 1st defendant and his four sons after payment of certain legacies and debts specified in the Will. The immoveable properties to be divided are items 1 to 53 in schedule A. B schedule comprises moveable properties left by the deceased and C schedule, the amounts due to the estate. The plaintiff claimed two shares on the allegation that his brother Joseph had assigned his share to him. According to the plaintiff the 1st defendant was managing all the properties of the deceased even during his life time and at the time of his death, she had with her a sum of Rs.14000 as accumulated income of the properties. This was also included among the assets to be partitioned. The plaintiff also sought for settlement of accounts of the income which had accrued after Anthony's death and which was in the possession of the 1st defendant as executrix under the Will, Ext.III. Besides his share, the plaintiff also claimed a sum of Rs.8084-10-5 as amount due to him from deceased Anthony. Defendants 1, 8, 9 and

10 filed written statements. In view of the limited scope of the appeal it is unnecessary to state elaborately the contentions of all the contesting defendants. All the defendants except the 1st defendant have acquiesced in the decree passed by the trial court. The main contentions of the 1st defendant were that she had no management till the death of her husband, that the income of the properties was not kept by her and that she had discharged several debts binding on the estate. Two of such debts were amounts due to the 3rd defendant's wife Mariamma and the 2nd defendant's wife Thresiamma, being the income from their properties which Anthony had taken. She claimed to have discharged these and several other debts. She claimed credit for these payments. The court below upheld the 1st defendant's case that she had no management of the properties till the time of Anthony's death and that she was not liable to account for the profits till that date. The two payments alleged to have been made by her to her daughters-in-law were found against.

There were certain negotiations for partition before the institution of the suit and some mediators attempted a division. They had divided the immoveable properties into several schedules and by consent of parties, the properties in schedules A and B were taken by the plaintiff soon after the institution of the suit. So far as the immoveable properties are concerned the parties agreed to abide by the division by the mediators and an order was passed by the court below on 6-12-1121, ratifying the said arrangement.

The trial court passed a preliminary decree declaring that items 1 to 53 in schedule A of the plaint were the immoveable properties available for partition. In respect of moveables, the plaint claim was disallowed in respect of certain items specified in the decree. As

the amount collected by the 1st defendant as executrix had also to be included among the partible assets, the trial court specified certain payments made by the 1st defendant as binding on the estate and she was made accountable for the balance. The points raised by the appellant mainly relate to two debts alleged to have been paid by her which were disallowed by the decree. The details regarding these may be stated when considering the same.

The first point raised on behalf of the appellant is that she is entitled to credit for the sums paid to Mariamma and Thresiamma. These are described as items 14 and 16 respectively in schedule C of her written statement. Of these, item 14 is a sum of Rs.1500 due to Mariamma as income of her properties and a sum of Rs.619-12-0 as interest thereon. As stated earlier Mariamma is the wife of the 3rd defendant. She was a rich heiress and she got one-half of the properties of her father who had only two daughters. Ext.119 is the deed of partition between Mariamma and her sister whereunder she got coconut gardens and paddy fields and the evidence is that the annual income of these properties amounted to about 7500 coconuts and 400 paras of paddy. Ext.XVI is an account ~~xxxxxxxx~~ of the income of these properties. After the death of Anthony the 1st defendant executed a promissory note Ext.XVII in favour of Mariamma on 25-1-1119 for a sum of Rs.4900. It is this amount which is stated to have been repaid by the 1st defendant with the income she received as executrix. The plaintiff's case on this point is that the 1st defendant was all along ~~xxx~~ managing these properties, that Anthony had nothing to do with it and that the estate was not answerable for the claim. The trial court upheld the plaintiff's case and disallowed the 1st defendant's claim. There was a similar claim regarding the income of the properties of Thresiamma wife of the 2nd defendant. She was married in Makaram 1114 and the dowry paid was a sum of Rs.5000. Ext.XVIII

is the account relating to this. Exts.P and D are sale deeds for properties purchased with the dowry amount. Of these Ext.P is a sale deed dated 31-5-1115 for Rs.1700 and Ext.D dated 31-8-1116 for Rs.3790-Annas 2. According to Ext.XVIII, the accrued income from these properties on 27-1-1119 was Rs.2050-7-3. On 1-1-1120 the 1st defendant executed a promissory note Ext.XIX in favour of Thresiamma for Rs.2200 and this debt is alleged to have been paid by her with the income of the estate on 30-12-1126. The contention of the plaintiff regarding this item is similar to the previous one. The main question which therefore arises for decision is whether the income of the properties of Mariamma and Thresiamma was collected and spent by Anthony or the 1st defendant. If Anthony took the income, the estate is answerable for the same. In considering this question reference has to be made to the plaintiff's case that during the latter part of his life Anthony was unable to manage his properties and that the 1st defendant was managing all his properties. This case was found against by the trial court. In the nature of the evidence in the case it is difficult to uphold the conclusion reached by the lower court regarding payment of the debts to Mariamma and Thresiamma. The 1st defendant filed several documents to substantiate her case that Anthony was managing the properties of his daughters-in-law. Exts.93 to 111 are the relevant documents. The learned Subordinate Judge does not appear to have paid proper attention to these documents. Ext.98 is an envelope on which Anthony has made a note in his own hand-writing that the contents were Mariamma's notes and receipts. Ext.99 is a similar envelope on which Anthony has made a note that the contents consisted of Mariamma's notices etc. Ext.100 is a notice received by Mariamma from V.I.K. Estate in respect of a property which belonged to the said estate and which had been originally devised in favour of a stranger. Anthony has made a note on it that the notice

relates to a property obtained by Mariamma in partition, that renewal fee in respect of the same had been paid in 1113 and that subsequent renewal had not become due. This entry appears to be the draft of the reply to the notice. As the notice was one dated 28-11-1117 Anthony must have written this on a later date, which shows that even one year before his death he was looking after Mariamma's properties. Ext.101 is a schedule of Mariamma's properties in which she had mortgage rights. Ext.102 is a letter to the 1st defendant from her brother relating to a property which belonged to Mariamma. Anthony has made a note at the bottom on 22-6-1117 to the effect that a reply was sent to his brother-in-law on the 22nd. Ext.103 is draft of the reply referred to in Ext.102 and this also contains a marginal note in Anthony's hand-writing. Ext.103A is draft of a letter sent by Anthony to his brother-in-law regarding the same property. Ext.104 is a receipt taken from one Verkey on payment of a sum of money due to him from Mariamma under the partition deed in her family. Anthony has made a note on the back of it in his own handwriting explaining the nature of the document. Ext.105 is a letter from a stranger to Anthony regarding certain amount due from him to Mariamma and asking for time for repayment. This is a debt referred to as item 20 in schedule B of Ext.119, the partition deed in Mariamma's family. This shows that deceased Anthony had sent a registered notice in Vrischikom 1117 for collection of the amount due to Mariamma. Exts.106 and 106A are letters from Anthony to the Vicar of a Church demanding payment of a debt to Mariamma. The debt itself is item 27 in schedule B of Ext.119. We have referred only to those documents which admittedly contain Anthony's handwriting. These show that Anthony was taking an active part in the management of the properties of Mariamma. As stated earlier most of these are of the years 1116 and 1117.

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The explanation offered by the plaintiff is that these being correspondence with strangers, Anthony may have attended to the same instead of leaving it to his wife. These however do not consist of correspondence alone. Some of these such as Exts.8% and 8% are notes made by Anthony in his own hand-writing on the back of envelopes stating that the contents related to Mariamma's properties. Certain circumstances were also relied on by the plaintiff to show that if the income had been collected and used by Anthony he would have given some document to his daughters-in-law especially as he executed promissory notes in favour of all creditors including close relatives. Exts.XIV, XV(b), XXI and XXIV are such promissory notes. The fact that these items did not find a place in a book Ext.XIII wherein he had noted his debts was also relied on. Anthony being dead it is not possible to ascertain why he did not execute any document to his daughters-in-law or enter these in Ext.XIII. A possible explanation is that these amounts were entered in accounts written by one E.K.Joseph who was looking after Anthony's properties and writing the accounts relating to the same. Again, since Anthony was managing his own properties till the end it is difficult to hold that he left it to his wife to manage the properties of his daughters-in-law. It has also to be stated that this is a point on which the plaintiff could not give reliable evidence as he was not staying with Anthony or the 1st defendant during this period. On the other hand there is oral evidence supporting the 1st defendant's case. D.W.6 is Mr.P.A. Verghese, a son-in-law of Anthony and the 1st defendant. He is an I.C.S. Officer still in service and there is evidence in the case to show that his advice was sought by all the parties in several matters. He has deposed that the properties of Mariamma and Thresiamma went into the common pool and that Anthony was in

financial difficulties even though he owned several immoveable properties. He further stated that his information that the income was not treated separately from the personal income of Anthony was obtained from the 1st plaintiff and the 1st defendant. We believe his testimony in full. Defendants 2 and 3 have also deposed in support of the case of their mother the 1st defendant. Their evidence is that their father was managing these properties and taking the income. The 2nd defendant deposed that Anthony himself had told him so. The 3rd defendant stated that his father was collecting the income of Mariamma's properties and that the only occasion on which he received money out of such income was in 1117 when he required Rs.250 to go to Bombay. He added that there was no need to take a document from his father since proper accounts were being kept. The promissory note was taken from his mother after his father's death as he was in the army and as he thought that nobody would be answerable for the amount if anything happened to his mother also. We have already stated that the 1st plaintiff was not in a position to have any direct knowledge about this matter. Even though Defendants 2 and 3 are parties to the suit we are not prepared to say that they should be disbelieved on that ground. The documentary evidence referred to earlier fully supports their version. Coming to the debt due to Thresiamma; reference may be made to Exts.110 and 111, letters sent by Anthony to Thresiamma's father regarding disposition of her dowry amount. In Ext.110 dated 13-5-1114 he suggested that the amount should be deposited in her father's Bank as the rate of interest was higher than was available in the Banks at Ernakulam. In Ext.111 dated 20-1-1115 he asked for return of 1600 Rupees for purchasing a property for Thresiamma and her husband. All the reasons which weighed with us for holding that Anthony was looking after Mariamma's properties and taking the income thereof

apply to Thresiamma's properties also. We therefore hold that the income of these properties was taken and utilised by Anthony and that the estate is answerable for the same. The 1st defendant is therefore entitled to credit for the amounts paid by her to Mariamma and Thresiamma.

The next point relates to the appellant's claim for credit of Rs.6000 in addition to what has been decreed. This claim arises out of a chitty transaction. We do not consider that this point merits elaborate discussion as this was not raised in the written statement. The 1st defendant appended various schedules to her written statement but she omitted to include this in any of these. If her case regarding this is true, she is entitled to deduct Rs.6000 from the amount due to the 1st plaintiff. In that case there is no explanation for not referring to this as she had questioned a small portion of the amount claimed by the 1st plaintiff from the estate. During the course of the argument we pointed out this omission in the pleadings and Shri Venkiteswara Iyer, learned counsel for the appellant then filed an application for amendment of the written statement. We do not think there is any justification for allowing the application. According to the 1st defendant the mediators who attempted to effect a settlement of the dispute prepared schedules regarding claims and counter-claims. It is admitted that this claim was not raised before them. The suit was hotly contested in the court below and it is unlikely that the 1st defendant who was careful enough to mention even trivial claims could have overlooked this substantial sum of Rs.6000. The evidence as it stands also does not support the new plea. According to the 1st defendant her husband had an unprized ticket in a kuri conducted by a church. The plaintiff's wife also had a ticket which she prized and the prize money was received by Anthony who in turn assigned his unprized ticket to the plaintiff

under Ext.89. According to the 1st defendant the subscriptions for both these tickets were paid by Anthony till the termination of the kuri. The 1st defendant has not produced receipts to substantiate that subscriptions were thus paid by Anthony in respect of both the tickets. Ext.J is a letter given by Anthony to the plaintiff regarding the kuri transaction. This also does not support this claim. If Anthony really had to get Rs.3000 under this head he is not likely to have omitted to refer to it in Ext.J. Further discussion is unnecessary as the application for amendment is refused. This point is therefore decided against the appellant.

The third point raised is that the plaintiff who took the properties in schedules A and B was liable to pay Rs.1000 to the 1st defendant and a similar sum to the 2nd defendant for equalisation of shares and that he should have been made liable for interest thereon from the beginning of 1122 as he took possession of all the properties in schedules A and B as per the order dated 6-12-1121. The 1st defendant's case is that the 1st plaintiff should be made liable for interest on Rs.2000 from the beginning of 1122 or at any rate from the date of the preliminary decree. This is a point which may be left for decision to the court below at the time of passing the final decree. The appellant is allowed to raise this in the court below and the same will be considered when passing the final decree. We do not therefore propose to decide this claim at this stage.

The last point raised relates to the declaration in the decree ~~[illegible]~~ in respect of a sum of Rs.4875 being proceeds of the sale of a property under Ext.C and a sum of Rs.100 being the value of a school building. These are included among the partible assets. The point raised is that the liability of the 1st defendant in respect of these amounts does arise until all accounts

are settled and that it is incorrect to treat these as partible assets. All that the lower court means is that these are items to be taken into account when passing the final decree. The question of liability of the 1st defendant arises only in case she is finally held accountable for any amount.

The additional plaintiffs have filed a memorandum of cross-objections. The main ground relates to the disallowance of the claim in respect of the sum of Rs.14000 alleged to have been in the 1st defendant's possession at the time of Anthony's death as accumulated income of the properties. The lower court has given valid grounds for disallowing this claim. Anthony had to borrow even small amounts during his last ~~six~~ years and it is unlikely that he would have done so if the sum of Rs.14000 was available. Since Anthony was in management till his death the claim is not sustainable even if any portion of the income was available with the 1st defendant at the time of his death since it was open for Anthony to give the same to the 1st defendant. Another point relates to the value of the school building dismantled by the 1st defendant. The lower court has awarded only a sum of Rs.100 as against Rs.1000 claimed under this head. There is no satisfactory evidence in the case to support the plaintiff's claim. We do not think any modification is necessary under this head. The last point in the memorandum of objections relates to the direction regarding costs. The court below directed the plaintiff and the 1st defendant to bear their respective costs. We consider that the court below has exercised proper discretion in this matter and that interference is not called for. The memorandum of cross-objections must therefore be dismissed.

In the result the appeal is allowed to this extent viz., that in addition to the amounts given credit to by

the court below, the 1st defendant is given credit for the sum of Rs.4678 paid to Mariamma on 30-3-1120 and the sum of Rs.2268 paid to Thersiamma on 8-7-1120. These amounts will also be taken into account at the time of passing the final decree. The appeal is dismissed in other respects. Proportionate costs are allowed in the appeal. The memorandum of cross-objections is dismissed with costs.

14 November 1958.